Appendix "A"

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-50651

A True Copy
Certified order issued Apr 05, 2018
Clerk, U.S. Court of Appeals, Fifth Circuit

ALLAN LATOI STORY,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Western District of Texas

O R D E R:

Allen Latoi Story, Texas prisoner # 1904264, moves this court for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 application. He also moves this court for appointment of counsel, for extraordinary relief, for leave to supplement his COA exhibits, for discovery, and for an order compelling the district court to obtain documents in possession of the state.

Story argues that his conviction violates his constitutional rights in the following ways: (1) the State arrested him without a warrant and without probable cause; (2) the State knowingly suborned perjury from the prosecution's primary witness and also manufactured evidence; (3) the conviction resulted from ineffective assistance of counsel; (4) the State committed a violation under *Brady v. Maryland*, 373 U.S. 83 (1963) by

suppressing exculpatory evidence and also manufactured and fabricated evidence against him; (5) the trial court erred by excluding from evidence the recording of his interrogation and by denying him a jury instruction on self-defense; and (6) the State violated his right to a speedy trial. He also argues that his attorney was ineffective for failing to call medical experts in support of his defense. However, this court will not consider that claim because it was not raised in the district court. *See Henderson v. Cockrell*, 333 F.3d 592, 605 (5th Cir. 2003).

To obtain a COA on his remaining claims, Story must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When the district court's denial of federal habeas relief is based on procedural grounds, this court should issue a COA "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

Story has failed to make the requisite showing. Consequently his motion for a COA is DENIED. His outstanding motions are also DENIED.

Gregg Costa

GREGG J. COSTA
UNITED STATES CIRCUIT JUDGE

Appendix "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

ALLAN LATOI STORY #1904264	§	
	§	
v.	§	**6:16-CV-460-RP**
	§	
LORIE DAVIS	§	

ORDER

Before the Court are Petitioner's Application for Habeas Corpus Relief under 28 U.S.C. § 2254 (#1); Respondent's Answer (#14); Petitioner's Motion to Amend (#24) and Petitioner's Reply to Respondent's Answer (#25). Petitioner, proceeding pro se, has been granted leave to proceed in forma pauperis. For the reasons set forth below, the undersigned finds that Petitioner's application for writ of habeas corpus should be denied.

STATEMENT OF THE CASE

A. Petitioner's Criminal History

According to Respondent, the Director has lawful and valid custody of Petitioner pursuant to a judgment and sentence of the 19th District Court of McLennan County, Texas. Petitioner was charged by indictment with murder. *Ex parte Story*, App. No. 85,396-01 (SHCR (#16-19) at 55)). Petitioner was found guilty by a jury on December 12, 2013. *Id.* at 65, 77. Petitioner was enhanced to habitual offender status as a result of the jury's findings of true to Petitioner's previous convictions in Tennessee for aggravated assault and assault to rape. *Id.* at 67-68, 74. The jury assessed punishment at life imprisonment and judgment was entered accordingly. *Id.* at 74, 77.

Petitioner appealed his conviction and on November 5, 2010, the Thirteenth Court of Appeals affirmed. *Story v. State*, 13-14-00038-CR, 2015 Tex. App. LEXIS 11869 (Tex. App.–Corpus Christi, Nov. 19, 2015). Petitioner filed a petition for discretionary review, which the Court of Criminal Appeals refused on February 24, 2016. PDR No. 1626-15 (#15-1). Petitioner then filed a state application for writ of habeas corpus on May 30, 2016. *See* SHCR (#16-19) at 20. The Texas Court of Criminal Appeals denied the application without written order on the findings of the trial court without a hearing on September 21, 2016. SHCR (#16-5). Petitioner filed this petition on December 14, 2016. Pet. (#1) at 11.

B. Factual Background

The Thirteenth Court of Appeals summarized the facts of the case as follows:

> Appellant was indicted for murder relating to the stabbing death of Zachary Davis. Joyce Akers testified that she was a longtime friend of Rene Davis, Zachary's sister. Akers was at Rene's apartment with Zachary, Rene, and appellant on the night of the altercation. She recalled that Rene and appellant were arguing, when appellant said "if you keep at it, I'm going to put my hands on you." Zachary responded "as long as I'm here, you're not going to put hands on her." Appellant told Zachary that if he interfered, he would kill him. Akers testified that appellant then left the room, and when he returned, Zachary told him "whatever you went back there to get or whatever you call yourself doing, you're going to have to use it." Appellant then walked out the back door, and Rene followed as the two continued arguing. Akers testified that appellant then grabbed Rene and lifted her up by her throat. At that time, Zachary intervened and struck appellant with his fist, which resulted in a physical altercation between Zachary and appellant. Akers recalled that, as Zachary and appellant were punching each other, appellant fell to the ground and Rene started hitting appellant. Akers testified that the fighting stopped and appellant stood up and walked toward the back door, while Zachary walked away from the back porch and into the yard. As appellant was walking away, he dropped a knife and picked it up. Akers stated appellant then approached Zachary who fell to the ground on his back. Akers testified appellant got on top of Zachary and stabbed him several times, while she yelled "please stop stabbing him." After the stabbing, Rene ran into the house and came back outside with a hammer. Appellant stood up and entered the apartment, while Zachary ran away from the apartment. Akers stated that neither Zachary nor Rene had a weapon when they were fighting appellant.

Officer Jason Ireland with the Waco Police Department testified that he responded to the scene and observed Zachary on the ground gasping for breath. Zachary died shortly after his arrival. Officer Ireland learned that appellant was suspected of stabbing Zachary and obtained his cell phone number. He attempted to locate appellant's cell phone by determining its GPS location. For three to four hours, Officer Ireland and other law enforcement officials searched for appellant using "pings" from appellant's cell phone. Officer Ireland narrowed appellant's location to a residence within four to five blocks of the crime scene. After confirming appellant was located in the house, an officer with a canine called for him to come out. After two commands from the officer, appellant exited the residence. Officer Ireland did not observe any physical injuries, and appellant did not request medical treatment. Appellant was arrested and taken to the county jail.

Appellant's counsel questioned Officer Ireland outside the presence of the jury concerning his interview with appellant. Officer Ireland testified he talked to appellant in his patrol car shortly after his arrest, and the interview was recorded. During the interview, appellant stated "[Rene and Zachary] were jumping me and I defended myself." Appellant claimed that he saw a hammer and some knives. Appellant stated he was on the ground and "they hit me first." Appellant explained that "[Zachary] hit me and I fell to the ground and [Rene] came over and kicked me."

Appellant's counsel moved to admit the recorded interview as impeachment of Officer Ireland's testimony "about [appellant's] voluntariness of coming out of the house and also about injuries and so forth." Appellant's counsel also argued the recording was admissible under "Texas Rules of Evidence 107, the Rule of Optional Completeness." The State objected that the video was hearsay and irrelevant. The trial court sustained the State's objections.

Angelika McCallister, a crime scene technician for the Waco Police Department, testified concerning photographs of the crime scene and the parties involved in the altercation. McCallister explained that appellant had a number of superficial and non-life threatening injuries, but that Rene did not exhibit any injuries.

Dr. Janice Townsend-Parchman, the Dallas County medical examiner, performed Zachary's autopsy. She testified that Zachary suffered three stab wounds to the: (1) front left shoulder, penetrating 4 3/4 inches; (2) liver, penetrating 4 3/4 inches; and (3) right thigh, penetrating 3 inches. Dr. Townsend-Parchman concluded the three stab wounds caused Zachary's death.

Rene testified during appellant's case-in-chief. Rene stated that after arguing with appellant, she went outside with Zachary. Appellant followed them, and they continued to argue. Rene testified Zachary punched appellant "because [appellant] acted like he was going to choke me." Rene denied that appellant picked her up by her throat. During the altercation between appellant and Zachary, appellant ended up on the ground, and she began hitting appellant with a stick. Rene estimated that the stick was two to three feet long and less than four inches in diameter. After she saw appellant stab Zachary, she went inside the apartment to get a hammer. Rene was not

sure if she hit appellant with the hammer or not. Following the altercation, appellant ran into the apartment and locked the door, while Zachary ran toward the parking lot.

On cross-examination, Rene testified that she gave a statement to police on the night of Zachary's death, but did not mention the stick or the hammer because she was scared. Rene acknowledged she visited appellant in the jail on four occasions following Zachary's death. She admitted appellant asked her to marry him during one of the visits and discussed his upcoming trial with her.

The jury found appellant guilty and assessed punishment at life imprisonment.

Story, 2015 Tex. App. LEXIS 11869 at *1-6.

C. Petitioner's Grounds for Relief

Petitioner raises the following grounds for relief:

1. He was arrested illegally without a warrant or probable cause in violation of his constitutional rights;

2. The prosecutor manufactured evidence and coerced the state's primary witness to testify against him, allowing this witness to give false and perjured testimony;

3. He received ineffective assistance of counsel when trial counsel failed to:
   a. fully investigate his case or interview any of the State's witnesses;
   b. disclose exculpatory evidence and impeach the State's witnesses;
   c. object to the State's motion in limine; and
   d. adequately pursue a speedy trial;[1]

4. The State failed to respond to his pretrial motion for discovery, deliberately altered, doctored, and tampered with evidence, and deliberately suppressed exculpatory and impeachment evidence;

5. The trial court erred when it denied admission of the interrogation tape and denied his request for a jury instruction on self-defense.

Pet. (#1) at 7-9; Mot. (#24) at 3.

[1] This claim was not in Petitioner's original petition, but Petitioner filed a motion to amend his petition to add this claim. The Court grants his motion and will address his claim regarding a speedy trial.

D. Request for Evidentiary Hearing

Petitioner asserts that his application for habeas relief raises factual questions, which have not been addressed by the state courts and that the state has failed to provide Petitioner with a full and fair hearing concerning his application. Petitioner concludes that he is entitled to an evidentiary hearing to resolve the factual questions left unresolved by the state courts.

DISCUSSION AND ANALYSIS

A. The Antiterrorism and Effective Death Penalty Act of 1996

The Supreme Court has summarized the basic principles that have grown out of the Court's many cases interpreting the 1996 Antiterrorism and Effective Death Penalty Act. *See Harrington v. Richter*, 562 U.S. 86, 97–100 (2011). The Court noted that the starting point for any federal court in reviewing a state conviction is 28 U.S.C. § 2254, which states in part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The Court noted that "[b]y its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Harrington*, 562 U.S. at 98.

One of the issues *Harrington* resolved was "whether § 2254(d) applies when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied." *Id.* Following all of the Courts of Appeals' decisions on this question, *Harrington* concluded that the deference due a state court decision under § 2554(d) "does not require that there be an opinion from the state court explaining the state court's reasoning." *Id.* (citations omitted). The Court noted that it had previously concluded that "a state court need not cite nor even be aware of our cases under § 2254(d)." *Id.* (citing *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam)). When there is no explanation with a state court decision, the habeas petitioner's burden is to show there was "no reasonable basis for the state court to deny relief." *Id.* And even when a state court fails to state which of the elements in a multi-part claim it found insufficient, deference is still due to that decision, because "§ 2254(d) applies when a 'claim,' not a component of one, has been adjudicated." *Id.*

As *Harrington* noted, § 2254(d) permits the granting of federal habeas relief in only three circumstances: (1) when the earlier state court's decision "was contrary to" federal law then clearly established in the holdings of the Supreme Court; (2) when the earlier decision "involved an unreasonable application of" such law; or (3) when the decision "was based on an unreasonable determination of the facts" in light of the record before the state court. *Id.* at 100 (citing 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). The "contrary to" requirement "refers to the holdings, as opposed to the dicta, of . . . [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Dowthitt v. Johnson*, 230 F.3d 733, 740 (5th Cir. 2000) (quotation and citation omitted).

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by . . . [the Supreme Court] on

> a question of law or if the state court decides a case differently than . . . [the Supreme Court] has on a set of materially indistinguishable facts.

Id. at 740-41 (quotation and citation omitted). Under the "unreasonable application" clause of § 2254(d)(1), a federal court may grant the writ "if the state court identifies the correct governing legal principle from . . . [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 741 (quotation and citation omitted). The provisions of § 2254(d)(2), which allow the granting of federal habeas relief when the state court made an "unreasonable determination of the facts," are limited by the terms of the next section of the statute, § 2254(e). That section states that a federal court must presume state court fact determinations to be correct, though a petitioner can rebut that presumption by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). But absent such a showing, the federal court must give deference to the state court's fact findings. *Id.*

B. Evidentiary Hearing

Section 2254(e)(2) provides:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that–
>
> (A) the claim relies on--
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Petitioner has failed to plead any allegations that would entitle him to a hearing. He only asserts conclusory positions that he is entitled to a new punishment hearing, and that the state court factual

determination was not supported by the record. Accordingly, Petitioner's request for an evidentiary hearing is denied.

C. Unexhausted and Procedurally Barred Claim

Petitioner failed to properly exhaust his state court remedies with respect to his claim that his counsel was ineffective for failing to adequately pursue a speedy trial. As a consequence, Petitioner's claim regarding denial of a speedy trial is procedurally barred.

The exhaustion doctrine requires that the state courts be given the initial opportunity to address and, if necessary, correct alleged deprivations of federal constitutional rights. *Castille v. Peoples*, 489 U.S. 346, 349 (1989). In order to satisfy the exhaustion requirement, a claim must be presented to the highest court of the state for review. *Richardson v. Procunier*, 762 F.2d 429, 431 (5th Cir. 1985). Moreover, all of the grounds raised in a federal application for writ of habeas corpus must have been "fairly presented" to the state courts prior to being presented to the federal courts. *Picard v. Conner*, 404 U.S. 270, 275 (1971). In other words, in order for a claim to be exhausted, the state court system must have been presented with the same facts and legal theory upon which the petitioner bases his assertions. *Id.* at 275–77. Where a "petitioner advances in federal court an argument based on a legal theory distinct from that relied upon in the state court, he fails to satisfy the exhaustion requirement." *Wilder v. Cockrell*, 274 F.3d 255, 259 (5th Cir. 2001) (citing *Vela v. Estelle*, 708 F.2d 954, 958 n.5 (5th Cir. 1983)).

Petitioner did not raise any claim regarding a speedy trial request or the ineffectiveness of his counsel regarding a speedy trial in his direct appeals, and Petitioner's state application for writ of habeas corpus did not raise any claim related to this issue. Therefore, by filing this federal writ

of habeas corpus, Petitioner has bypassed the state courts and attempted to present an original speedy trial claim to the federal courts before the state court has had the opportunity to review it.

With regard to this unexhausted claim, Petitioner is consequentially procedurally barred from federal habeas corpus review. Even where a claim has not been reviewed by the state courts, this Court may find that claim to be procedurally barred. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). If a petitioner has failed to exhaust his state court remedies and the state court to which he would be required to present his unexhausted claims would now find those claims to be procedurally barred, the federal procedural default doctrine precludes federal habeas corpus review. *Id.*; *see Nobles v. Johnson*, 127 F.3d 409, 423 (5th Cir. 1997) (finding unexhausted claim, which would be barred by the Texas abuse-of-the-writ doctrine if raised in a successive state habeas petition, to be procedurally barred).

Here, Petitioner has failed to exhaust his claims regarding a speedy trial request or the ineffectiveness of his counsel regarding a speedy trial. However, if the Court required Petitioner to present this claim to the Texas Court of Criminal Appeals to satisfy the exhaustion requirement, the Texas Court of Criminal Appeals would find it to be procedurally barred under the Texas abuse-of-the-writ doctrine. *See Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995) ("[T]he highest court of the State of Texas announced that it would as a 'rule' dismiss as abuse of the writ 'an applicant for a subsequent writ of habeas corpus rais[ing] issues that existed at the time of his first writ.'") (quoting *Ex Parte Barber*, 879 S.W.2d 889, 892 n. 1 (Tex. Crim. App. 1994). Further, the Texas habeas corpus statute prohibits a Texas court from considering the merits of, or granting relief based on, a subsequent writ application filed after the final disposition of an inmate's first application unless he demonstrates the statutory equivalent of cause or actual innocence. TEX. CODE

CRIM. PROC. ANN. art. 11.07 § 4 (West Supp. 1996). In addition, for the Court to reach the merits of this claim, Petitioner "must establish cause and prejudice from [the court's] failure to consider his claim." *Fearance*, 56 F.3d at 642 (citations omitted). Petitioner has failed to establish cause and prejudice, and he has not shown that he is actually innocent. Therefore, this claim is procedurally barred.

D. Petitioner's Fourth Amendment Claim

Petitioner argues Detective January lied in an affidavit in order to secure a probable cause affidavit. Specifically, Petitioner argues Detective January falsified his affidavit by claiming that Petitioner assaulted Rene Davis. Petitioner asserts that he was never charged with assaulting Ms. Davis, and thus Detective January's statement was a lie. Petitioner also complains that he was never afforded any probable cause hearing.

As explained by Respondent, a federal court may not grant habeas relief based on a Fourth Amendment violation where the state has provided an opportunity for full and fair litigation of the issue. *Stone v. Powell,* 428 U.S. 465, 493-95 (1976); *Janecka v. Cockrell*, 301 F.3d 316, 320 (5th Cir. 2002). This rule applies to all claims arising under the Fourth Amendment. *See,e.g. Janecka,* 301 F.3d at 320 (search and seizure); *Jones v. Johnson*, 171 F.3d 270, 277-78 (5th Cir. 1999) (arrest). A petitioner must plead and prove the state court proceeding was inadequate in order to obtain post-conviction relief in federal court. *Davis v. Blackburn,* 803 F.2d 1371, 1372 (5th Cir. 1986). Petitioner had the opportunity to challenge the warrant for his arrest and the probable cause affidavit in state court on Fourth Amendment grounds. Not only did he not challenge these issues in state court, but when he raised his Fourth Amendment claim in his state writ of habeas corpus, the state habeas court found there was no factual basis for the underlying allegations (SHCR (#16-18

at 4)) and the Texas Court of Criminal Appeals denied the application without written order on the findings of the trial court. *Id.* at #16-5.

It is apparent Petitioner was afforded a full and fair opportunity to litigate his Fourth Amendment issues in state court. Petitioner is therefore barred from seeking federal habeas relief on these grounds. *See Caver v. Alabama*, 577 F.2d 1188, 1192 (5th Cir. 1978) ("An 'opportunity for full and fair litigation' means just that: an opportunity. If a state provides the processes whereby a defendant can obtain full and fair litigation of a Fourth Amendment claim, *Stone v. Powell* bars federal habeas corpus consideration of that claim whether or not the defendant employs those processes"). Accordingly, Petitioner is not entitled to federal habeas corpus relief on this claim.

To the extent Petitioner is alleging that he was denied a probable cause hearing in violation of state law, federal habeas corpus relief is unavailable. "Federal habeas relief cannot be had 'absent the allegation by a petitioner that he or she has been deprived of some right secured to him or her by the United States Constitution or the laws of the United States.'" *Malchi v. Thaler*, 211 F.3d 953, 957 (5th Cir. 2000) (quoting *Orellana v. Kyle*, 65 F.3d 29, 31 (5th Cir. 1995)). Accordingly, where a state court's denial was based on the applicability of state laws, a federal habeas court may not rule to the contrary. *Charles v. Thaler*, 629 F.3d 494, 500 (5th Cir. 2011). Because Petitioner's claim regarding a probable cause hearing is solely a matter of state law, it must be dismissed.

E. Manufactured or False Evidence

Petitioner claims that the prosecutor and police presented false evidence to the grand jury and coerced Ms. Akers to testify falsely against Petitioner. Specifically, Petitioner asserts that the State presented evidence to the grand jury that Petitioner was assaulting Ms. Davis prior to the stabbing, even though Petitioner was not charged with assault. Pet. (#1-1) at 12. Petitioner also asserts that the

State presented evidence of the knife used in the stabbing to the grand jury, but that it was not Petitioner's knife. *Id.* at 13. As for the alleged false testimony, Petitioner essentially argues that Ms. Akers was not present at the time of the stabbing and that because Ms. Davis's testimony conflicts with Ms. Akers's testimony, Ms. Akers was lying. *Id.* at 13-15.

A criminal defendant is denied due process when the prosecution knowingly uses perjured testimony at trial or allows untrue testimony to go uncorrected. *Giglio v. United States*, 405 U.S. 150 (1972); *Faulder v. Johnson*, 81 F.3d 515, 519 (5th Cir. 1996). To establish a denial of due process through the use of perjured testimony, a petitioner must show "that (1) the witness gave false testimony; (2) the falsity was material in that it would have affected the jury's verdict; and (3) the prosecution used the testimony knowing it was false." *Reed v. Quarterman*, 504 F.3d 465, 473 (5th Cir. 2007); *see also Creel v. Johnson*, 162 F.3d 385, 391 (5th Cir. 1998). Perjured testimony is only material if it is also shown that there was a reasonable likelihood that it affected the jury's verdict. *Giglio*, 405 U.S. at 153–154. "Conflicting or inconsistent testimony is insufficient to establish perjury." *Kutzner v. Johnson*, 242 F.3d 605, 609 (5th Cir. 2001).

Petitioner has not established the witnesses' statements were perjurious or that the prosecutor knew the testimony was false. Instead, Petitioner merely cites contradictory testimony from Ms. Davis and inconsistencies within Ms. Akers's testimony. Having independently reviewed the entire state court record, this Court finds nothing unreasonable in the state court's application of clearly established federal law or in the state court's determination of facts in light of the evidence. Accordingly, the Court is of the opinion that 28 U.S.C. § 2254, as amended by the AEDPA, bars habeas corpus relief on Petitioner's claim that the State presented false evidence or perjured testimony.

F. Ineffective Assistance of Counsel Claims

1. AEDPA Impact

Petitioner alleges his trial counsel was ineffective for failing to (1) fully investigate his case or interview any state's witnesses; (2) disclose exculpatory evidence and impeach the State's witnesses; (3) object to the State's motion in limine. Petitioner raised these same issues in his state habeas application and the Court of Criminal Appeals rejected the merits of Petitioner's claims. As such, the AEDPA limits the scope of this Court's review to determining whether the adjudication of Petitioner's claims by the state court either (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

2. Standard of Review

Ineffective assistance of counsel claims are analyzed under the well-settled standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant can make both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. In deciding whether counsel's performance was deficient, the Court applies a standard of objective reasonableness, keeping in mind that judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 686-689. "A fair assessment of attorney performance requires that every

effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (citation omitted). Ultimately, the focus of inquiry must be on the fundamental fairness of the proceedings whose result is being challenged. *Id.* at 695-97. Accordingly, in order to prevail on a claim of ineffective assistance of counsel, a convicted defendant must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 687.

3. Failure to Conduct an Adequate Investigation

Petitioner alleges counsel failed to conduct an adequate investigation because he failed to interview several of the State's witnesses, including Ms. Akers. Pet. (#1-1) at 18. Petitioner also alleges counsel's investigation was inadequate because he failed to subpoena records from a television station showing an interview with Ms. Davis. *Id.* at 19. Petitioner asserts that the interview could have produced "exculpatory or impeachment evidence." *Id.*

"A defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial." *United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989). Petitioner asserts that counsel failed to interview any of the State's witnesses prior to trial, though he admits that counsel attempted to interview the State's witnesses, but was unsuccessful. Reply (#25) at 18. Petitioner

claims that if counsel had interviewed the police officers before trial, he could have obtained information regarding why Petitioner was not charged with assaulting Ms. Davis. *Id.* Despite his indictment for murder, Petitioner indicates that the alleged assault of Ms. Davis was "the sole reason" that Petitioner was going to trial. *Id.* at 19. Petitioner implies, without explanation, that there would not have been a trial at all if it could have been proved that Petitioner did not assault Ms. Davis. *Id.*

As for the interview footage, Petitioner claims that counsel told Petitioner that counsel could not find the interview footage, but Petitioner asserts that a subpoena for those records had not been served. Pet. (#1-1) at 19. Petitioner asserts that the interview footage will show that Ms. Akers was not present at the time of the stabbing and that Petitioner did not assault Ms. Davis. *Id.* Ms. Davis testified at trial to these same issues, stating that Ms. Akers had already left the house at the time of the stabbing, Ms. Davis did not see her during the fight (Tr. (#15-9) at 65:5-8), and Petitioner did not pick her up by her throat and choke her (Tr. (#15-9) at 33:2-4). It is unclear what additional information Petitioner believes would have been available in the interview footage.

Petitioner has not demonstrated what evidence further investigation or interviews would have revealed or how it would have changed the outcome of his trial. *Green*, 882 F.2d at 1003. The Fifth Circuit has made clear that conclusory allegations of ineffective assistance of counsel do not raise a constitutional issue in a federal habeas proceeding. *Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir. 1983). Having independently reviewed the entire state court record, this Court finds nothing unreasonable in the state court's application of clearly established federal law or in the state court's determination of facts in light of the evidence. Accordingly, the Court is of the opinion that 28

U.S.C. § 2254, as amended by the AEDPA, bars habeas corpus relief on Petitioner's claim that he received ineffective assistance of trial counsel for his failure to investigate.

4. Failure to Disclose Exculpatory Evidence and Impeach the State's Witnesses

Petitioner alleges his counsel failed to adequately cross-examine Ms. Akers about her criminal record, probation violation, incarceration, drug addiction, and her status as an MHMR patient. Pet. (#1-1) at 22. Petitioner also asserts his own attorney failed to disclose exculpatory evidence, specifically notes from a phone conversation between Petitioner and Ms. Davis that Petitioner alleges would have refuted Ms. Akers's testimony. *Id.* at 22-23. Petitioner also alleges that counsel failed to utilize a letter from Petitioner that stated Ms. Akers was present at Ms. Davis's home to buy drugs. *Id.* at 23. Petitioner alleges that an alternative cross-examination strategy and the use of alleged exculpatory evidence would show that Ms. Akers "may or may not be trustworthy" and that the jury "might have decided not to trust her." *Id.*

Petitioner's assertion that a phone conversation between himself and Ms. Davis could have been introduced into evidence, much less that it would have somehow altered the outcome of the trial, is insufficient to meet his burden. As explained above, Ms. Davis testified differently than Ms. Akers at trial. As for the cross-examination, the trial record makes clear that counsel cross-examined Ms. Akers thoroughly and sought to use aspects of her testimony to make the case for self-defense.

Having independently reviewed the entire state court record, this Court finds nothing unreasonable in the state court's application of clearly established federal law or in the state court's determination of facts in light of the evidence. Accordingly, the Court is of the opinion that 28 U.S.C. § 2254, as amended by the AEDPA, bars habeas corpus relief on Petitioner's claim that

he received ineffective assistance of trial counsel for failing to disclose evidence or impeach a witness.

5. Failure to Object to the State's Motion in Limine

The state filed a motion in limine to exclude 1) any statements made by the defendant, or any reference to the statements and the fact that they may have been recorded; and 2) any prior bad acts of any witness for the State. Petitioner asserts that counsel was ineffective for failing to object. Petitioner has not stated the grounds for an objection; he has not shown that he was prejudiced by the motion in limine, and he has not shown that the trial court would have sustained an objection or that it would have changed the result of his trial.

Counsel is not required to file frivolous motions or make frivolous objections. *Green v. Johnson*, 160 F.3d 1029, 1037 (5th Cir. 1998). And accordingly, "failure to make a frivolous objection does not cause counsel's performance to fall below an objective level of reasonableness." *Id.* (citing *Sones v. Hargett*, 61 F.3d 410, 415 n.5 (5th Cir. 1995)). Even if Petitioner's proposed objections were not frivolous, Petitioner has failed to show how he was prejudiced by the failure to object.

Having independently reviewed the entire state court record, this Court finds nothing unreasonable in the state court's application of clearly established federal law or in the state court's determination of facts in light of the evidence. Accordingly, the Court is of the opinion that 28 U.S.C. § 2254, as amended by the AEDPA, bars habeas corpus relief on Petitioner's claim that he received ineffective assistance of counsel on his failure to object.

G. Suppression of Evidence Claim

1. AEDPA Impact

Petitioner argues that the prosecution withheld favorable evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Pet. (#1-1) at 25-27. Specifically, Petitioner alleges that the prosecution failed to produce an unedited version of a video tape of Petitioner's conversation with Dannique Porter, Petitioner's complete phone records, an interview report from an interview between a detective and Ms. Davis, and jail phone call recordings. *Id.* Petitioner raised this same issue in his state habeas application and the Court of Criminal Appeals rejected the merits of Petitioner's claim. As such, the AEDPA limits the scope of this Court's review to determining whether the adjudication of Petitioner's claim by the state court either (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

2. Standard of Review

The suppression by the prosecution of evidence favorable to an accused, after a request, violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. *Brady*, 373 U.S. at 87. Thus, to establish a Brady violation, a habeas petitioner must prove that: (1) the prosecution suppressed evidence, (2) the evidence was favorable, (3) the evidence was material to either guilt or punishment, and (4) discovery of the allegedly favorable evidence was not the result of a lack of due diligence. *Rector v. Johnson*, 120 F.3d 551, 558 (5th Cir. 1997) (emphasis added). Further, evidence is material only if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the

proceeding would have been different." *United States v. Bagley*, 473 U.S. 677, 682 (1985); *Rector*, 120 F.3d at 562.

Having independently reviewed the entire state court record, this Court finds nothing unreasonable in the state court's application of clearly established federal law or in the state court's determination of facts in light of the evidence. Petitioner read a letter in open court requesting this discovery material and the parties had a discussion on the record about what the State had produced. Both Petitioner's counsel and counsel for the State agreed that all materials had been produced. Tr. (#15-7) at 5:23-9:17. Petitioner continues to argue that some of this evidence will show that Ms. Davis told investigators that Petitioner did not assault her. He complains that the jury was never told that Petitioner was not charged with assault and that Ms. Davis said Petitioner did not assault her. Reply (#25) at 25.

Petitioner also alleges there was tampering with cell phone records in order to show a phone call from Petitioner to Ms. Davis that Petitioner alleges did not occur. *Id.* at 27. Again, Petitioner's argument is that the jury should not have believed Ms. Akers' testimony and that the State must have fabricated phone records to corroborate Ms. Akers' testimony. *Id.* Petitioner provides no evidence to support this, only his own conclusory allegations. As explained above, both Ms. Akers and Ms. Davis testified at trial. Ms. Davis testified that Petitioner did not assault her, Ms. Akers testified that she witnessed Petitioner grab Ms. Davis by the throat and that Petitioner went after the victim and stabbed him. Ms. Davis testified differently. Unfortunately for Petitioner, the jury credited Ms. Akers' testimony that Petitioner assaulted Ms. Davis and that Petitioner was the aggressor in the murder. Accordingly, Petitioner's claim does not warrant federal habeas relief.

H. Alleged Trial Court Errors

1. AEDPA Impact

Petitioner argues the trial court violated his constitutional rights by denying admission of the interrogation videos between himself and detectives. Pet. (#1-1) at 31. Petitioner also alleges the trial court wrongly denied his request for a jury instruction on self-defense. Pet. (#1-1) at 33. Petitioner raised these same issues in his state habeas application and the Court of Criminal Appeals rejected the merits of Petitioner's claims. As such, the AEDPA limits the scope of this Court's review to determining whether the adjudication of Petitioner's claim by the state court either (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

2. Exclusion of the Interrogation Tapes

Federal habeas courts do not "sit to review the mere admissibility of evidence under state law." *Little v. Johnson*, 162 F.3d 855, 862 (5th Cir. 1998); *see also Derden v. McNeel*, 978 F.2d 1453, 1458 (5th Cir. 1992) ("Errors of state law, including evidentiary errors, are not cognizable in habeas corpus."). The Court's sole inquiry is whether the admission of this evidence violated the Constitution. *McGuire*, 502 U.S. at 68. The Due Process Clause only provides relief from an evidentiary ruling that is "so unduly prejudicial that it render[ed] the trial fundamentally unfair . . . ." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991); *see also Hafdahl v. Johnson*, 251 F.3d 528, 536 (5th Cir. 2001) ("If evidence of an extraneous offense is wrongly admitted, however, habeas corpus relief is proper only if the error is of such magnitude that it resulted in fundamental unfairness.").

Having independently reviewed the entire state court record, this Court finds nothing unreasonable in the state court's application of clearly established federal law or in the state court's determination of facts in light of the evidence. Here, Petitioner believes the tapes of his interviews with detectives were critical to his defense because they supported Petitioner's trial theory of self-defense. Pet. (#1-1) at 31. Petitioner fails to show any constitutional error. Petitioner essentially argues that he should have been able to present his own self-serving hearsay statements that the murder was committed in self-defense rather than testifying at trial. This does not entitle him to federal habeas relief.

3. Denial of Self-Defense Jury Instruction

Petitioner asserts there was evidence in the record of self-defense and thus the trial court erred in denying a jury instruction on self-defense. This issue was argued in full on direct appeal and the appellate court upheld the trial court's decision. Essentially, Petitioner argues that his version of events shows that he was acting in self-defense. The problem for Petitioner is that the state court found that there was no evidence of his version of events in the trial record. Petitioner offers nothing more than his own conclusory statement that he was acting in self-defense when he stabbed Zachary Davis and that Zachary and Renee Davis instituted the attack on Petitioner. Petitioner asserts that if the alleged perjured testimony of Ms. Akers had been disallowed, it would have been clear from Ms. Davis's testimony that Petitioner was acting in self-defense. Having independently reviewed the entire state court record, this Court finds nothing unreasonable in the state court's application of clearly established federal law or in the state court's determination of facts in light of the evidence. Petitioner fails to show any constitutional error.

CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(A). Pursuant to Rule 11 of the Federal Rules Governing Section 2254 Cases, effective December 1, 2009, the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where a district court rejected a petitioner's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* "When a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

In this case, reasonable jurists could not debate the dismissal or denial of the Petitioner's section 2254 petition on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, the Court shall not issue a certificate of appealability.

Appendix "B"

It is therefore **ORDERED** that Petitioner's Motion to Amend Petition (#24) is **GRANTED**.

It is further **ORDERED** that Petitioner's Application for Habeas Corpus Relief under 28 U.S.C. § 2254 is **DISMISSED WITH PREJUDICE IN PART** and **DENIED IN PART**.

It is further **ORDERED** that any other pending motions are **DISMISSED** as moot.

It is further **ORDERED** that a certificate of appealability is **DENIED**.

SIGNED on July 12, 2017.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-50651

ALLAN LATOI STORY,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Western District of Texas

Before HIGGINBOTHAM, JONES, and COSTA, Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's motion for Certificate of Appealability. The panel has considered appellant's motion for reconsideration. IT IS ORDERED that the motion is DENIED.